

1993

# OSI Industries, Inc. dba Otto and Sons v. Auditing Division of the Utah State Tax Commision: Brief of Respondent

Utah Court of Appeals

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CKET NO. 930185CA

93-0185-

Priority Category No. 15

PETITION FOR REVIEW OF THE FINAL ORDER  
OF THE UTAH STATE TAX COMMISSION

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Utah Court of Appeals

MAR 30 1993

Mary T. Noonan  
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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OSI INDUSTRIES, INC.	)	
d/b/a/ Otto & Sons,	)	
	)	Appeal No.
Petitioner,	)	
	)	
vs.	)	Supreme Court No. 920528
	)	
AUDITING DIVISION OF THE	)	Priority Category No. 15
UTAH STATE TAX COMMISSION,	)	
	)	
Respondent.	)	
	)	

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BRIEF OF RESPONDENT

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PETITION FOR REVIEW OF THE FINAL ORDER  
OF THE UTAH STATE TAX COMMISSION

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### JURISDICTION AND NATURE OF PROCEEDING

This appeal is from a final decision of the Utah State Tax Commission.

This court has jurisdiction to hear the appeal under Utah Code Ann. §§ 78-2-2(3)(e)(ii) and 63-46b-16(2)(a).

### STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND STANDARD FOR APPELLATE REVIEW

ISSUE I. The Tax Commissions finding that the exemption granted in Utah Code Ann. § 59-12-104(20) did not apply was reasonable.

Standard of Review: The standard of review is "abuse of discretion" because the Commission was granted express and implied discretion by statute.

ISSUE II. The Tax Commissions assessment on OSI's use of a liquid nitrogen spray in its manufacturing process was reasonable under Utah Code Ann. § 59-12-103(1)(1) and Utah Code Admin. P. R865-19-29S(1B).

Standard of Review: The standard of review is "abuse of discretion" because the Commission was granted express and implied discretion by statute.

DETERMINATIVE STATUTORY PROVISIONS

Basic tax provisions:

§ 59-12-103(1)(1), Utah Code Ann., as amended.

§ 59-12-103, sales and use tax base - rate:

There is levied a tax on the purchaser for  
the amount paid or charged for the following:

. . . .

(1) tangible personal property stored, used,  
or consumed in this state.

Utah Code Ann. § 59-12-104(20) (Cum. Supp. 1991):

The following sales and uses are exempt from  
the taxes imposed by this chapter:

. . . .

(20) sprays and insecticides used to control  
insects, diseases, and weeds for commercial  
production of fruits, vegetables, feeds,  
seeds, and animal products;

. . . .

Section 59-12-118, Utah Code Ann., as amended.

Section 59-12-118 "[t]he administration of  
this chapter is vested in and shall be  
exercised by the Commission which may  
prescribe forms and rules to conform with  
this chapter for the making of returns and  
for the ascertainment, assessment, and  
collection of the taxes imposed under this  
chapter."

Utah Code Admin. P. R865-19-29S(1B) (1991-1992):

Tangible personal property or services which  
are purchased by a manufacturer or compounder  
which do not become and remain an integral  
part of the article being manufactured or  
compounded are subject to sales or use tax.



### STATEMENT OF THE CASE

The Auditing Division of the Utah State Tax Commission assessed use tax deficiency for OSI's use of liquid nitrogen in its meat processing plant. The Utah State Tax Commission ("Tax Commission") issued its Findings of Fact, Conclusions of Law and Final Decision affirming the Auditing Division's assessment. The audit period included calendar years 1988, 1989 and 1990. The amount of tax, interest and penalty for the audit period was \$230,234.65. OSI argued that the purchases fit within the exemption in Utah Code Ann. § 59-12-104(20) as a spray and insecticide for production of animal products. OSI now appeals the Final Decision of the Tax Commission.

### STATEMENT OF FACTS

The statement of facts listed in the Brief of Petitioner substantially represents the facts in this case as stipulated prior to hearing and subsequent thereto. However, the facts the Commission found relevant to its decision and are not contested, should be emphasized.

The Petitioner operates a meat processing plant which produces ground beef and pork patties for sales to McDonald's Restaurants. The patties are made from bulk meat which is supplied to the Petitioner from other sources. (Tax Commission Final Decision p. 1.)

In the process of producing the patties, liquid nitrogen is

sprayed onto the patties to flash freeze them to a very low temperature. The patties are then packed in containers and placed in cold storage to maintain their hard frozen condition while awaiting shipment in refrigerated vehicles to McDonald's Restaurants. (Tax Commission Final Decision p. 2.)

The freezing process is used to preserve the uniformity, freshness, quality and purity of the patties and also acts as a retardant to spoilage. (Tax Commission Final Decision p. 2.)

During the audit period in question, the Petitioner purchased its liquid nitrogen from its vendors and did so without paying sales tax on the purchase price. The Petitioner maintained that the use of liquid nitrogen constituted a "spray" used in the production of animal products and thus was exempt from taxation as provided for by Utah Code Ann. § 59-12-104(20).

#### SUMMARY OF ARGUMENT

OSI relied upon Utah Code Ann. § 59-12-104(20) as providing it with an exemption from the Tax Commission's assessment. Contrary to OSI's contentions, this exemption does not apply. OSI contends that liquid nitrogen qualifies as an exemption under this section which exempt "sprays and insecticides use to control insects, diseases, and weeds for commercial production of fruits, vegetables, feeds, seeds and animal products."

The Tax Commission correctly interpreted Utah Code Ann. § 59-12-104(20). The exemption statute is to be construed as a

comprehensive whole and not piecemeal. Morton Int'l, Inc. v. Auditing Div., 814 P.2d 581, 591 (Utah 1991). When this exemption is read as a whole, its clear intent is to exempt sprays and insecticides used in agricultural production.

The Tax Commission assessed OSI for its use of a liquid nitrogen spray in processing manufactured meat patties for McDonald's restaurants. This assessment was correct pursuant to Utah Code Ann. § 59-12-103(1)(1) which taxes "tangible personal property stored, used or consumed in this state." During OSI's use, the liquid nitrogen spray is entirely consumed. None of the spray becomes an ingredient or component of the final product.

The proper standard of review under the Utah Administrative Procedures Act is the "abuse of discretion" standard. OSI's use of liquid nitrogen spray in its manufacturing process does not come within the ambit of the exemption. Even if the "correction of error" standard were applied, the Tax Commission should be sustained.

OSI's interpretation of § 59-12-104(20) should not be allowed under the well established principle of taxation which requires tax exemptions to be strictly construed against the taxpayer and in favor of the taxing authority. Parsons Asphalt Products v. Utah State Tax Comm'n, 617 P.2d 397, 398 (Utah 1980). Under this principle, OSI's broad reading of § 59-12-104(20) cannot stand, and the Tax Commission's decision should be affirmed.

## ARGUMENT

I. THE TAX COMMISSION CORRECTLY FOUND THAT OSI DOES NOT FALL WITHIN THE SALES AND USE TAX EXEMPTION UNDER THE UTAH CODE ANN. § 59-12-104(20).

A. THE PROPER STANDARD OF REVIEW UNDER UAPA IS THE "ABUSE OF DISCRETION" STANDARD. THUS, THE TAX COMMISSION'S DECISION SHOULD BE AFFIRMED UNLESS EXACT ITS ACTION IS FOUND TO BE UNREASONABLE.

Discussing the standard of review under UAPA, the Utah Supreme Court Stated:

Under UAPA, this court reviews an agency decision which interprets statutory law using the correction of error standard found in section 63-46b-16(4)(d), unless the legislature has granted the agency discretion in interpreting and administering the statute. Agency discretion may be either express or implied and, if granted, results in review of the agency action for an abuse of discretion under section 63-46b-16(4)(h)(i).

Nucor Corp. v. Utah State Tax Comm'n, 187 Utah Adv. Rep. 17, 18 (Utah 1992) (footnotes omitted)<sup>1</sup> See King v. Industrial Comm'n, No. 920464-CA, (Utah App., March 18, 1993). Thus, if either express or implied discretion is found, the proper standard of review is § 63-46b-16(4)(h)(i) Utah Code Ann. which provides:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

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<sup>1</sup>The Supreme Court has also stated, "[i]n many cases where we would summarily grant an agency deference on the basis of its expertise, it is also appropriate to grant the agency deference on the basis of an explicit or implicit grant of discretion contained in the governing statute." Morton Int'l, Inc. v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581, 588 (Utah 1991). See also King v. Industrial Comm'n, No. 920464-CA, (Utah App., March 18, 1993).

. . . .

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute; . . . .

The standard of review appellate courts apply under § 63-46b-16(4)(h)(i) is one of "reasonableness". The Utah Supreme Court stated, "[I]n past cases, we have held that an agency has abused its discretion when the agency's action, viewed in the context of the language and purpose of the governing statute, is unreasonable." Morton at p. 587 (footnote omitted).

In the case at bar, the Commission has been granted both express and implied discretion to interpret the relevant statutes. Utah's Sales and Use Tax Act provides, "[T]he administration of this chapter is vested in and shall be exercised by the Commission which may prescribe forms and rules to conform with this chapter for the making of returns and for the ascertainment, assessment, and collection of the taxes imposed under this chapter." Utah Code Ann. § 59-12-118 (1987). The Utah Court of Appeals has stated that by enacting § 59-12-118 "[t]he legislature has granted the Commission discretion in administration of the tax code generally." Putvin v. Utah State Tax Comm'n, 837 P.2d 589 (Utah App. 1992). Recently the Utah Court of Appeals reiterated both an explicit and implicit grant of discretion by statute. King v. Industrial Commission, No. 920464-CA slip op. at 10 (Utah App. March 18, 1993). The King

case is included as Appendix 1 to this brief.

Should this Court find no explicit grant of discretion, it is clear that the Tax Commission has also been granted implied discretion to interpret and apply the relevant statutes. First, the terms of the exemption statute at issue are broad enough to be open to interpretation by the Tax Commission. In Morton this Court stated, "we had held that when the operative terms of a statute are broad and generalized, these terms bespeak a legislative intent to delegate their interpretation to the responsible agency." Morton, 581 P.2d at 588 (citation omitted).

The Tax Commission did not abuse its discretion in applying the facts and finding OSI's use of liquid nitrogen was beyond the intended limits of the exemption.

Should this Court determine that deference not be given to the Tax Commission's Final Decision, ample evidence exists in the record at the formal hearing and in the stipulated facts for this Court to affirm the final decision of the Tax Commission on its own merits. No error was committed in the findings of fact and conclusions of law in the decision of the Tax Commission. The Tax Commission correctly applied the rule of noscitur a sociis from the Morton case (Tax Commission Final Decision p. 4) and using that rule when it concluded, "when applying that rule of statutory construction to the present case, it becomes clear that the word 'sprays' is meant to be a substance which is used in the same manner as an insecticide or herbicide which may be applied

to agricultural or animal products to prevent or destroy diseases. Here, the liquid nitrogen is not an insecticide or herbicide and the only reason it would qualify under the exemption as proposed by the Petitioner is that it is sprayed upon the meat patties." (Tax Commission Final Decision p. 4.)

The Tax Commission went on to state, "Admittedly, the liquid nitrogen, when used to freeze the meat patties, helps to prevent and retard the growth of bacterial micro-organisms which lead to spoilage. This natural process of spoilage however does not constitute a 'disease' as contemplated under this statute. As used in the statute, the word 'diseases', implies an external force such as infection, that creates an abnormal impairment of a plant or animal's normal functions. It does not imply the natural decay of agricultural or animal products." (Tax Commission Final Decision p. 5.)

Common sense would limit the application of the exemption to the "growing" end of food production, not the "consumption" end. Basically, the liquid nitrogen used by the Petitioner freezes the processed food as hard as a brick so that it can be stored, shipped and stored again before it is finally grilled for a McDonald's customer. Certainly, no error was committed in finding this process outside the intentions of the exemption.

**B. THE TAX COMMISSION WAS CORRECT IN FINDING OSI'S  
USE OF LIQUID NITROGEN DOES NOT FIT WITH THE  
REASONABLE MEANING OF § 59-12-104(20).**

OSI claims that its use of liquid nitrogen falls within the

exemption granted in Utah Code Ann. § 59-12-104(20) (Supp. 1991) which exempts "sprays and insecticides used to control insects, diseases, and weeds for commercial production of fruits, vegetables, feeds, seeds and animal products." OSI's argument is without merit. No weeds or insects are affected by their liquid nitrogen.

As there is no substantive legislative history on this specific exemption, one must turn to rules of statutory construction to find the proper interpretation of this exemption statute.<sup>2</sup> A fundamental rule of statutory construction requires the words of a statute to be construed as a comprehensive whole and not piecemeal. See, e.g., Morton Int'l, Inc. v. Auditing Division, 814 P.2d 581 (Utah 1991); and Amax Magnesium Corp. v. Utah State Tax Comm'n, 796 P.2d 1256, 1258 (Utah 1990). OSI's interpretation violates this rule of statutory construction.

Additionally, the Tax Commission's use tax assessment against OSI is consistent with the "well-established principle that tax exemption statutes are to be strictly construed against the party claiming the exemption and all ambiguities are to be resolved in favor of taxation." Morton, 814 P.2d at 591. Even

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<sup>2</sup>The Legislature established this exemption in 1957. This was before the legislative proceedings were recorded which began in 1959. Therefore, there is no record of legislative intent when this exemption for insecticides first went into effect. The only other significant singular change made to this exemption was in 1987 when the sales and use taxes were consolidated into the same section.



though taxing statutes should generally be construed favorable to the taxpayer and strictly against the taxing authority, the reverse is true of exemptions. Statutes which provide for exemptions should be strictly construed, and one who so claims has the burden of showing his entitlement to the exemption. Parson Asphalt Products v. Utah State Tax Comm'n, 617 P.2d 397, 398 (Utah 1980); Morton, 814 P.2d at 591. Under a strict construction, OSI's interpretation of § 59-12-104(20) cannot stand. Only by dissecting and torturing the words contained in the exemption statute can the Petitioner logically argue for inclusion in the pesticide and insecticide exemption.

Petitioner's brief goes to great length to define a number of terms that show the potentially expansive application of the exemption phrase. The problem with this approach is that by so misconstruing the terms, the phrase can be extended to its logical absurdity resulting in the inclusion of such materials as water used for washing fruits, vegetables and other produce, and any preservatives which might be applied to food products. Common sense application of the statute, with references to weeds and insects, and fruits and vegetables, logically confines its scope to agricultural production.

Because every possible factual example cannot be defined by statute, it is the administrative agency's responsibility to examine the facts of a case to determine if they come within the logical limits of the statute. Preservatives retard or terminate

the growth of microorganisms which are in themselves diseased or which produce toxins that become diseases when ingested. Freezing food products retards spoilage and allows their transportation over long distances increasing their usefulness and commercialization. The Commission was correct in concluding that this process for presentation and handling did not come within the language of the exemption.

This Court should reference the final decision by the Tax Commission in reference to this argument:

By reading each of the words set forth in subsection 20 and defining them, not within the context of which they are used, but singularly and standing alone, one might arrive at the interpretation the Petitioner argues for. To do so however, violates the rule of statutory construction set forth by the Utah Supreme Court in [Morton]. There, the Utah Supreme Court stated that the rule of noscitur a sociis, provides that the meaning of questionable words and phrases in a statute be ascertain by reference to the words or phrases associated with them.

(Tax Commission Final Decision p. 4.)

A lengthy portion of Petitioner's brief is spent in describing what the legislature "could have" or "should have" done in regard to drafting the language of the exemption. As Petitioner correctly points out, there are no legislative notes or explanations relating to the drafting and passage of the statutory language to shed light on the limits of the exemption (see footnote 2, supra). But the Petitioner argues on one hand that microanalysis of each word in the exemption is necessary to

promote the inclusion of liquid nitrogen within its meaning (Petitioner's brief at pp. 14-17), and on the other hand macroanalysis of conjunctive phrases or the exemption as a whole should not be applied if it works against the Petitioner's interest (Petitioner's brief at p.18).

Morton involved a taxpayer which had constructed manufacturing facilities to produce sodium azide pellets and igniter material which were components of the crash protection air bag system used in automobiles. The taxpayer argued that its expenditures in constructing these facilities were exempt under Utah Code Ann. § 59-12-104(15) (1987) which exempted:

sales or leases of materials, machinery, equipment, and services of any person in excess of \$500,000 for any tax year used in the new construction, expansion, or modernization . . . of any mine, mill, reduction works, smelter, refinery (except oil and gas refineries), synthetic fuel processing and upgrading plant, rolling mill, coal washing plant, or melting facility . . .

Id. at 589 (original emphasis).

The taxpayer in Morton contended that "the sodium azide pellets are synthetic fuels and that, therefore, Morton's facilities constitute a 'synthetic fuel processing and upgrading plant' as that term is used in section § 59-12-104(15)." Id. at 589. Morton argued, like OSI's argument in its brief, that the dictionary definition of the terms "synthetic" and "fuel" when combined, was broad enough to include the sodium azide pellets within the statutory language of a "synthetic fuel." Id. at 590.

The Morton court found that this would lead to absurd results and turned to other rules of statutory construction. The court stated:

One such method of statutory construction is the rule of noscitur a sociis, which provides that the meaning of questionable words and phrases in a statute be ascertained by reference to words or phrases associated with them. The terms surrounding "synthetic fuel processing and upgrading plant" all relate to different aspects of the mining or material reclamation operations. This suggests that the term "synthetic fuel processing and upgrading plant" should be interpreted in accordance with the term's relationship to the mining industry.

Id. at 590-91 (footnote omitted).<sup>3</sup>

When examining § 59-12-104(20) as a whole, the general intent behind the statute is that sprays and insecticides are exempt when used in agricultural production. It is only by dissecting § 59-12-104(20), in violation of a fundamental rule of statutory construction, that OSI circumvents the general intent of the statute thus enabling it to claim an exemption. However, a common sense approach would not lead one to conclude that § 59-12-104(20) exempts a liquid nitrogen spray used to freeze meat

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<sup>3</sup>See also Dole v. United Steel Workers of America, 494 U.S. 26, 36 (1990) ("The traditional canon of construction noscitur a sociis, dictates that 'words grouped in a list should be given related meaning.'" (citations omitted); Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786, 791 (Utah 1977) ("Under the rule of interpretation, noscitur a sociis, which teaches that terms should be understood in the light of and take character from the associated terms, . . .")

patties.<sup>4</sup>

The rule of noscitur a sociis and the analysis in Morton supports the Tax Commission's interpretation of § 59-12-104(20) in this case. This statute, when read as a whole and applying the statutory construction rule of noscitur a sociis, exempts only those sprays and insecticides used in agricultural production.

The Tax Commission relied on its finding that the liquid nitrogen, was primarily used for preservation of the product during transportation rather than a spray used to "control insects, diseases, and weeds." This conclusion is logical in light of the many methods used to preserve food products from the manufacturer or processor to the marketplace. Therefore, when § 59-12-104(20) is examined as a comprehensive whole, its language does not cover OSI's use of a liquid nitrogen spray to freeze meat patties.

**II. THE TAX COMMISSION CORRECTLY ASSESSED OSI ON ITS USE OF LIQUID NITROGEN PURSUANT TO UTAH CODE ANN. § 59-12-103(1)(1).**

The Tax Commission's deficiency assessment against OSI was a proper calculation of sales or use taxes which OSI owed the Tax

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<sup>4</sup>"The object of statutory construction is to give a sensible and practical meaning to the statute as a whole in order that it may be applied in future cases without difficulty . . . and if a literal interpretation leaves a result inconsistent with the general statutory intention, such interpretation must give way to the general intent. This is particularly true where such a literal interpretation would lead to unjust and mischievous consequences." Burpulis v. Director of Revenue, 498 A.2d 1082, 1087 (Del. 1985).

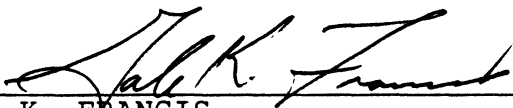
Commission for the audit period. Utah taxes "tangible personal property stored, used or consumed in this state" Utah Code Ann. § 59-12-103(1)(1) (1992). The Tax Commission's Administrative Rule also supports the assessment. (Utah Code Admin. P. R865-19-295(1B)(1991-1992)). OSI purchased and used liquid nitrogen in its production of hamburger patties for McDonald's. OSI did not pay sales or use tax on any of its purchases or uses of the liquid nitrogen in its manufacturing process prior to the Tax Commission's use tax assessment. OSI's use of liquid nitrogen in producing meat patties falls within the statute and should be taxed pursuant to § 59-12-103(1)(1) since the liquid nitrogen is used the process, then withdrawn from the process and discarded. Both parties agree that the liquid nitrogen is consumed by OSI and would be taxable unless it qualifies under the exemption outlined in issue I above.

#### CONCLUSION

The Tax Commission acted in accordance with its statutory authority in applying the exemption to the facts of this case. When read as a whole, the exemption clearly is intended to apply to insecticides and weed killers used in agricultural production and does not logically include the flash-freezing process using liquid nitrogen. One with a common sense knowledge of farming and ranching can sense the intent of the exemption when incorporating, as the legislature did, words like weeds, insects,

fruits, vegetables, feeds and seeds. The exemption was meant to cover substances at the growing end, not the consumption end of the food chain. This court should defer to the discretion of the Tax Commission, or determine the matter on its own merits, and affirm the Tax Commission's Final Decision.

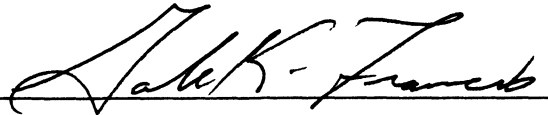
DATED this 30<sup>th</sup> day of March, 1993.

  
\_\_\_\_\_  
GALE K. FRANCIS  
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 30<sup>th</sup> day of March, 1993, I caused two (2) copies of the foregoing BRIEF OF RESPONDENT to be mailed, postage prepaid, to:

WALTER P. FABER, JR.  
Attorney at Law  
2102 East 3300 South  
Salt Lake City, UT 84109

  
\_\_\_\_\_



## APPENDIX 1

MAR 18 1993

IN THE UTAH COURT OF APPEALS

*Mary T. Noonan*  
Mary T. Noonan  
Clerk of the Court

-----00000-----

Mark King,	)	OPINION
	)	(For Publication)
Petitioner,	)	
	)	
v.	)	Case No. 920464-CA
	)	
The Industrial Commission of	)	
Utah; Workers Compensation	)	F I L E D
Fund; and Superior Roofing	)	(March 18, 1993)
Company,	)	
	)	
Respondents.	)	
	)	

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Original Proceeding in this Court

Attorneys: Robert Breeze, Salt Lake City, for Petitioner  
Richard G. Sumsion, Salt Lake City, for Respondents

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Before Judges Billings, Greenwood, and Russon.

BILLINGS, Presiding Judge:

Petitioner Mark King seeks reversal of an Order of the Industrial Commission of Utah denying him temporary total disability compensation for the period of his incarceration at the Utah State Prison and for the period after his release until corrective surgery was performed. We reverse and remand for the calculation and payment of benefits.

FACTS

King suffered an on-the-job injury to his wrist on November 20, 1989, while working for Superior Roofing Company. King received temporary total disability benefits from the Utah Workers' Compensation Fund from November 21, 1989 through May 22, 1990. The Fund also paid medical expenses.

King was scheduled for surgery to correct his wrist injury on May 30, 1990. However, on May 22, 1990, King was incarcerated

at the Utah State Prison for a parole violation. Because of his incarceration, surgery was postponed. Temporary total disability compensation was terminated during the period of King's incarceration and for the period after his release until corrective surgery was performed. King was released from prison on October 13, 1990. King was admitted for surgery on January 29, 1991 and surgery was performed on January 30, 1991. Temporary total disability compensation resumed on January 29, 1991 and continued through July 14, 1991, covering the period of King's surgery and recovery.

On July 9, 1991 an Administrative Law Judge (ALJ) denied King's claim for temporary total disability benefits during the period from May 22, 1990 through January 28, 1991. The ALJ further ordered that the Workers' Compensation Fund was entitled to a credit for all temporary total compensation paid to King after May 22, 1990 and before January 29, 1991. The ALJ determined King's "loss of wages for the claimed period was not related to the industrial accident whatsoever, but, rather, was solely due to the actions or conduct of the applicant which resulted in his being incarcerated." The Industrial Commission affirmed the order of the ALJ. This appeal followed.

#### STANDARD OF REVIEW

On appeal, King seeks temporary total disability compensation for the period between May 22, 1990 and January 28, 1991, the period of his incarceration and the period after his release until corrective surgery was performed. King contends the Industrial Commission erroneously interpreted and applied the workers' compensation statutes in denying him compensation.

Because the proceedings in this case began after January 1, 1988, we review them under the Utah Administrative Procedures Act (UAPA). See Utah Code Ann. §§ 63-46b-0.5 to -22 (1989 & Supp. 1992). Judicial review of agency action under UAPA is controlled by Utah Code Ann. § 63-46b-16 (1989). Section 4 of that statute enumerates the situations under which a court can grant relief.<sup>1</sup>

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1. That section provides:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency

(continued...)

Because the controlling precedent from the Utah Supreme

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1. (...continued)

action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

- (i) an abuse of the discretion delegated to the agency by statute;
- (ii) contrary to a rule of the agency;
- (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
- (iv) otherwise arbitrary or capricious.

Utah Code Ann. § 63-46b-16 (1989).

Court is less than clear<sup>2</sup> and because of divergence in recent opinions of this court over how we discern the appropriate standard of review under UAPA, we take the opportunity today to discuss the issue in depth. Compare Putvin v. Tax Comm'n, 837 P.2d 589 (Utah App. 1992)<sup>3</sup> (finding grant of discretion in broad statutory language without identifying whether it was explicit or implicit) with Chevron U.S.A., Inc. v. Tax Comm'n, 207 Utah Adv. Rep. 23, 24 & n.6 (Utah App. 1993)<sup>4</sup> (finding no explicit grant of discretion because no statutory directive to interpret a term). We feel compelled to take this approach due to the admonitions this court recently received from the supreme court in State v. Thurman, 203 Utah Adv. Rep. 18 (Utah 1993). In that case, which resolved a conflict in this court regarding the standard of review applicable in certain criminal matters, the supreme court noted its

uneasiness with the persistence of the division in the court of appeals on this [standard of review] issue. To the extent that this disagreement simply represents an evolution of two conflicting interpretations of the same legal doctrine by different panels of judges, its persistence is contrary to the doctrine of stare decisis. . . .  
. . . It is one thing to admit that differences among judges on a particular legal question can exist; it is quite another to sanction variability in the rule of law depending solely on which of several judges of an appellate court sit on a given case.

Id. at 25. Thus, to eliminate any confusion as to the analytical model this court is following to determine the appropriate standard of review under UAPA, we engage in a rather laborious discussion of the standard of review.

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2. Cf. State v. Thurman, 203 Utah Adv. Rep. 18, 24-25 (Utah 1993) (acknowledging supreme court's failure to clearly articulate standards of review).

3. Opinion by Judge Billings with Judges Jackson and Russon concurring.

4. Opinion by Judge Bench with Judge Garff concurring and Judge Russon concurring in the result only.

### A. Issues of Fact

Under UAPA, the standard we apply when reviewing factual findings is clear. The only subsection under which factual findings can be challenged is 63-46b-16(4)(g). Under that subsection, we will change a factual finding only if it "is not supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (1989). Accord Zissi v. Tax Comm'n, 198 Utah Adv. Rep. 15, 16 (Utah 1992). "Substantial evidence is that which a reasonable person 'might accept as adequate to support a conclusion.'" Stewart v. Board of Review, 831 P.2d 134, 137 (Utah App. 1992) (quoting Merriam v. Board of Review, 812 P.2d 447, 450 (Utah App. 1991) (quoting Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989))). To reach our conclusion we examine the entire record available to the court, not simply that which supports the findings of the ALJ. *Id.* Thus, Petitioner necessarily has the burden of marshaling "all of the evidence supporting the findings and show[ing] that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." Grace Drilling, 776 P.2d at 68. Accord Hales Sand & Gravel Inc. v. Tax Comm'n, 842 P.2d 887, 890 (Utah 1992). This review is not as strict as a de novo review of the proceedings, nor as lenient as a review for "any competent evidence" to support the findings, it simply accords deference to the agency where two reasonable, yet conflicting, conclusions could have been reached. See Grace Drilling, 776 P.2d at 68 & n.7.

Additionally, the Utah Rules of Appellate Procedure govern how we review agency actions. See Utah Code Ann. § 63-46b-16(2)(b) (1989). Rule 11(e)(2) of the Utah Rules of Appellate Procedure provides: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion." Utah R. App. P. 11(e)(2). Rule 11 requires counsel provide the appellate court with all evidence pertinent to the issues on appeal. See Sampson v. Richins, 770 P.2d 998, 1102 (Utah App.), cert. denied, 776 P.2d 916 (Utah 1989). Thus, our procedural rules specifically require a petitioner to provide a transcript of the proceedings if he is going to challenge factual findings under subsection 63-46b-16(4)(g). A petitioner must also provide a transcript if he argues a legal conclusion is unsupported by the evidence in the case. Otherwise we have no basis on which to evaluate the findings and conclusions.

## B. Issues of General Law

The standard we apply when an agency interprets or applies general law such as case law, constitutional law, or non-agency specific legislative acts is also clear. Our review in this area is guided by section 63-46b-16(4)(d). As we did prior to UAPA, we review agency interpretations of general law "under a correction of error standard, giving no deference to the agency's decision." Questar Pipeline Co. v. Tax Comm'n, 817 P.2d 316, 318 (Utah 1991). See also Zissi v. Tax Comm'n, 198 Utah Adv. Rep. 15, 16 (Utah 1992) (holding issues of law are reviewed for correctness under § 63-46b-16(4)(d)); Savage Indus., Inc. v. Tax Comm'n, 811 P.2d 664, 670 (Utah 1991) (finding agency's erroneous interpretation of law is grounds for relief under § 63-46b-16(4)(d)). In Morton International, Inc. v. Auditing Division, 814 P.2d 581 (Utah 1991), the supreme court articulated the reason for the correction of error standard is not simply because the court characterizes an issue as one of general law but because the agency has no special experience or expertise placing it in a better position than the courts to construe the law. *Id.* at 586.

## C. Issues of Agency-Specific Law

We are faced with a far more difficult task in deciding the amount of deference to grant an agency's interpretation or application of agency-specific statutory law. In that instance, we grant deference only "when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language." *Id.* at 589.' If there is a grant of discretion we review the agency

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5. Prior to UAPA we reviewed agency determinations under three distinct categories. While the standards for factual determinations and interpretations of general law remain the same, it is this intermediate area of scrutiny that has changed. Formerly

agency decisions involving mixed questions of law and fact or the application of specific factual situations to the legislative enactments under which the agency operates were to be given deference by the courts and were to be upheld so long as they fell within the bounds of reasonableness and rationality.

Savage Indus., Inc. v. Tax Comm'n, 811 P.2d 664, 667 (Utah 1991). We spent far less time grappling with the standard of review under this relatively simple analysis. The complexities involved in the new analysis seem not, in the end, to make a significant enough difference for the amount of energy we expend.

action under Utah Code Ann § 63-46b-16(4)(h)(i) (1989). See Chicago Bridge & Iron Co. v. Tax Comm'n, 196 Utah Adv. Rep. 18, 20 (Utah 1992). Where a grant exists, we will not disturb the agency's interpretation or application of the law unless its determination exceeds the bounds of reasonableness and rationality. Morton, 814 P.2d at 586-87, 589, 592; Cross v. Board of Review, 824 P.2d 1202, 1204 (Utah App. 1992). "[A]bsent a grant of discretion, a correction-of-error standard is used in reviewing an agency's interpretation or application of a statutory term." Morton, 814 P.2d at 588. See also Mor-Flo Indus., Inc. v. Board of Review, 817 P.2d 328, 330 (Utah App. 1991), cert. denied, 843 P.2d 516 (Utah 1992). In other words, we review agency interpretation or application of agency-specific statutes where no grant of discretion exists under Utah Code Ann. § 63-46b-16(4)(d). See Bennion v. Graham Resources, Inc., No. 910089, slip op. at 2 (Utah March 4, 1993).

The difficulty arises in determining whether an agency has been granted discretion and thus whether our review is governed by section 63-46b-16(4)(h)(i). In Morton, the supreme court reviewed the impact of UAPA on the standard of review an appellate court should utilize when an agency interprets or applies an agency-specific statute. Morton indicates that review under section 63-46b-16(4)(h)(i) represents a "break from prior law." Morton, 814 P.2d at 588. It held "an agency's statutory

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6. Appeals under the various subsections of 63-46b-16(4) are subject to various standards of review. For example, in Union Pacific Railroad Co. v. Tax Commission, 199 Utah Adv. Rep. 13 (Utah 1992), the railroad challenged some determinations of the Tax Commission. One challenge was to a rule of the Commission under section 63-46b-16(4)(h)(ii). Citing a pre-UAPA case the court held that rules promulgated by the agency and departures from those rules will be upheld if they are reasonable and rational. Id. at 14. The court engaged in no discussion of explicit or implicit grants of discretion. The court also held the railroad's challenge to the constitutionality of a sales tax under section 63-46b-16(4)(a) would be reviewed for correctness. Id. at 15.

Thus, Morton applies only when we are ascertaining whether an appeals is brought under section 63-46b-16(4)(h)(i) or 63-46b-16(4)(d). See also Nucor Corp. v. Tax Comm'n, 832 P.2d 1294 (Utah 1992) (noting review for abuse of agency discretion was under section 63-46b-16(4)(h)(i)); Anderson v. Public Service Comm'n, 839 P.2d 822 (Utah 1992) (noting review of claims that agency action was arbitrary and capricious under section 63-46b-16(4)(h)(iv) is for reasonableness). Because the standard of review under UAPA will vary based on the subsection the claim is  
(continued...)



construction should be given deference when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language." Id. at 589. However, Morton does not detail what the term explicit grant of discretion means. In Morton, the example of an explicit grant of discretion to an agency relates to the Tax Commission deciding whether a piece of equipment qualifies for an exemption from the sales and use tax. Id. at 588 n.40. The statute allows the exemption if the equipment is a "normal operating replacement . . . as determined by the commission." Utah Code Ann. § 59-12-104(15) (1992) (emphasis added). Thus, an explicit grant of discretion can be found when a statute specifically authorizes an agency to interpret or apply statutory language.

Morton also discusses when an implicit grant of discretion is present. We can find implicit grants of discretion in "broad and generalized" statutory language because such language indicates a legislative intent to delegate interpretative powers to the agency. Morton, 814 P.2d at 588. Articulated somewhat differently, if we find there are multiple permissible interpretations of statutory language we must defer to the agency's policy choice. Id. at 589. However, if we can derive the legislative intent in the statute by "traditional methods of statutory construction, [there is no implicit grant of discretion and] the agency's interpretation will be granted no deference and the statute will be interpreted in accord with its legislative intent." Id. at 589.

In one of its more confusing sections, Morton tells us "to the extent that our cases can be read as granting deference to an agency's decisions based solely on the agency's expertise," they are inconsistent with UAPA's command that we defer only on the basis of a statutory grant of authority. Morton, 814 P.2d at 587 (emphasis added). The court then immediately responds to this statement by recognizing the changes it discusses in standard of review "may not have significant effect." Id. We take this to mean that consideration of an agency's expertise and experience is relevant in determining whether the agency should make the necessary policy choice and thus be granted deference by the

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6. (...continued)  
brought under, we strongly encourage counsel to clearly identify under what section review is being sought and to make certain they identify the appropriate standard of review under that section. Cf. Bhatia v. Department of Employment Sec., 834 P.2d 574, 581-82 (Utah App. 1992) (Bench, P.J., concurring) (encouraging counsel to present an appropriate statutory construction in UAPA cases).

reviewing court.<sup>7</sup> Morton specifically states it should not be read as holding the ways of finding grants of discretion which it discusses "are the only methods of determining whether the legislature has granted the agency discretion in dealing with an issue." Morton, 814 P.2d at 589.

Morton's directive that we seek out grants of discretion before applying the deferential standard of review under 63-46b-16(4)(h)(i) has led this court to expend significant judicial resources on ascertaining the appropriate standard of review in appeals from executive agency decisions. Two somewhat different approaches have arisen in this court following Morton. Given the emerging nature of the law, this result is not surprising.

The approach this court originally took is exemplified by Tasters Ltd. v. Department of Employment Security, 819 P.2d 361

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7. This conclusion that agency expertise and experience remain appropriate considerations when assessing whether to grant deference is supported by Sanders Brine Shrimp v. Tax Commission, No. 910106 (Utah Jan. 28, 1993) and Board of Equalization v. Tax Commission, No. 910256 (Utah Jan. 20, 1993). In both cases, the supreme court cites a pre-Morton non-UAPA case, Chris & Dick's Lumber & Hardware v. Tax Commission, 791 P.2d 511 (Utah 1990), for the proposition that "[w]e give no deference to an administrative agency's interpretation of a statute absent certain circumstances, none of which exist here." Sanders, slip op. at 3; Board of Equalization, slip op. at 4. The circumstances referenced in Chris & Dick's are those instances where the agency's expertise should be deferred to. Chris & Dick's, 791 P.2d at 513-14.

Further, a footnote in Zissi v. Tax Commission, 198 Utah Adv. Rep. 15, (Utah 1992), a post-Morton UAPA case, also supports this conclusion. In that footnote the supreme court rejects applying an intermediate standard of review based in part on the rationale that "the issues are questions of constitutional law and statutory construction on which the Commission's experience and expertise will be of no real assistance." Id. at 21 n.2. The Zissi footnote relies on Silver v. Tax Commission, 820 P.2d 912 (Utah 1991), and Sandy City v. Salt Lake County, 827 P.2d 212 (Utah 1992), to support this proposition. Silver is a pre-UAPA case and Sandy City did not involve an agency of the state, thus, UAPA would not apply even if that case arose today.

Sanders, Board of Equalization, and Zissi all indicate agency experience and expertise are still relevant considerations in deciding whether there is a grant of discretion in cases arising under UAPA.

(Utah App. 1991).<sup>8</sup> In Tasters, the issue was the Department's interpretation and application of Utah Code Ann. § 35-4-22(j)(5) (Supp. 1989) (current version at id. § 35-4-22.3 (Supp. 1992)). That statute directs the Department to consider twenty factors in determining if an individual is an employee or an independent contractor. We found the language of the statute directing the agency to apply the statute "indicates an explicit grant of discretion" to the agency to determine whether an individual is an employee or an independent contractor. Tasters, 819 P.2d at 364. The language the court relied on provided: "unless it is shown to the satisfaction of the commission," the "[commission determines that the] weight of the evidence supports the finding" and "considered [by the commission] if applicable." Id. (quoting Utah Code Ann. § 35-4-22(j)(5) (Supp. 1989)). Thus, the statute in which we found an explicit grant of discretion authorized the commission to apply specific statutory language.

Other panels have followed the analysis used in Tasters. Recently, in Putvin v. Tax Commission, 837 P.2d 589 (Utah App. 1992),<sup>9</sup> the case turned on whether the petitioner met the statutory definition of nonresident for Tax Code purposes. We held the Tax Commission's determination was entitled to deference. In doing so, we recognized a general grant of authority to the Tax Commission to administer the statutes under which it operates and that the Tax Commission often makes determinations of residency status. Id. at 590. Thus, it could be argued we found an explicit grant of discretion. We also, however, recognized factors that would support a conclusion an implicit grant of discretion had been given. First, we acknowledged neither the statutory context nor normal statutory construction were helpful in determining what the legislature intended. Id. at 591. Second, we recognized the statutory term was subject to several possible interpretations and had been defined by detailed administrative regulations. Id. Thus, interpretation of the statute was better left to the policy expertise of the Commission."

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8. Opinion by Judge Jackson with Judges Garff and Greenwood concurring.

9. Opinion by Judge Billings with Judges Jackson and Russon concurring.

10. Judge Bench has expressed a concern that what we did in Putvin was find an explicit grant of discretion to the Tax Commission by virtue of Utah Code Ann. § 59-12-118 (1992). See Belnorth Petroleum Corp. v. Tax Comm'n, 204 Utah Adv. Rep. 29, 32 n.5 (Utah App. 1993). We agree the discretion we found in Putvin is better characterized as an implicit grant under Morton.

While we have not always articulated why we have found a grant of discretion or whether the discretion should be characterized as explicit or implicit, the result has been consistent with Morton. In each case the language of the statute and the statutory scheme support a finding of at least an implicit grant of discretion. For example, in Johnson-Bowles Co. v. Department of Commerce, 829 P.2d 101 (Utah App.),<sup>11</sup> cert. denied, 843 P.2d 516 (Utah 1992), we granted deference to the agency where its statutory scheme provided the executive director could penalize a broker "if he finds that" the broker has "engaged in dishonest or unethical" practices. Id. at 114 (quoting Utah Code Ann. § 61-1-6(1) (1989)). We held such language "bespeaks a legislative intent to delegate the interpretation of what constitutes dishonest and unethical practices in the securities industry . . . ." Id. Hence, although we did not articulate it, what we did under Morton was find the statutory language "broad and expansive" and capable of multiple interpretations thus indicating an implicit grant of discretion by the legislature.

Likewise, in Department of Air Force v. Swider, 824 P.2d 448 (Utah App. 1991),<sup>12</sup> we did not articulate the exact step under the Morton analysis where we found the agency had been granted discretion by the legislature. In Swider, an aircraft mechanic had been discharged from employment at Hill Air Force Base for drug use. He applied for unemployment benefits and after a hearing by an ALJ was granted them. The Board of Review upheld the ALJ's decision. The Air Force challenged the Board's conclusion the defendant was not "'culpable' for the purposes of establishing a 'just cause' termination." Id. at 450. We found statutory language permitting a denial of benefits if a termination was for "'just cause . . . if so found by the commission'" constituted the requisite grant of discretion. Id. at 451 (emphasis in original) (quoting Utah Code Ann § 35-4-5(b)(1) (Supp. 1991)). Under Morton, this was the appropriate result because the operative language authorized the Board to interpret and apply specific statutory language. As the supreme court noted would often be the case, the standard of review is the same as that we would have applied under the prior approach where we granted deference based on agency expertise. Morton, 814 P.2d at 588. See also Bhatia v. Department of Employment

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11. Opinion by Judge Russon with Judges Jackson and Orme concurring.

12. Opinion by Judge Orme with Judges Jackson and Russon concurring.

Sec., 834 P.2d 574, 577 (Utah App. 1992)<sup>13</sup> (following Swider); Robinson v. Department of Employment Sec., 827 P.2d 250, 252 (Utah App. 1992)<sup>14</sup> (finding explicit grant of discretion based on statutory language authorizing agency to determine issue of "voluntariness" and "good cause"). See also Valgardson Housing Sys. Inc. v. Tax Comm'n, No. 920644, slip op. at 3-4 (Utah App. March 12, 1993) (finding implicit grant of discretion in Utah Code Ann. § 59-12-102(13) (1987)).

Recently, Judge Bench has articulated a slightly different view of the appropriate analysis mandated by Morton. Under his reading, the first question is whether there is an explicit grant of discretion to the agency.<sup>15</sup> Ferro v. Department of Commerce,

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13. Opinion by Judge Billings with Judge Garff concurring and Judge Bench concurring with opinion.

14. Opinion by Judge Garff with Judges Greenwood and Russon concurring.

15. Creative counsel might read Judge Bench's dissent in Luckau v. Board of Review, 840 P.2d 811 (Utah App. 1992) and his concurrence in Bhatia as indicating we must look to see if the statute is unambiguous before we look for an explicit grant of discretion. See Luckau, 840 P.2d at 817 (Bench, P.J., dissenting); Bhatia, 834 P.2d at 581 n.4 (Bench, P.J., concurring).

The Luckau dissent cites language from Ferro regarding implicit grants of discretion in its assertion that ambiguity is the first step. See Luckau, 840 P.2d at 817 (Bench, P.J., dissenting). In Ferro, the language cited in Luckau came after Judge Bench's discussion of explicit grants of discretion and before his discussion of implicit grants of discretion. See Ferro, 828 P.2d at 510. The Bhatia footnote cites Mor-Flo Industries, Inc. v. Board of Review, 817 P.2d 328 (Utah App. 1991) to support the assertion: "We may not defer to an agency's interpretation until we know the legislature itself did not render its own discernable statutory interpretation." Bhatia, 834 P.2d at 581 n.4 (Bench, P.J., concurring). While this language could be interpreted as requiring an assessment of ambiguity first, it does not appear to be what was intended. If we followed that analysis, we would attempt to interpret the statute whether there was a grant of discretion to the agency or not.

Thus, we believe there is agreement that the court's first task is to look for an explicit grant of discretion. If we were to ignore an explicit grant of discretion and apply a plain language test first, we would ignore the legislature's intent to  
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828 P.2d 507, 510 & n.5 (Utah App. 1992)" (citing Morton, 814 P.2d at 589). If there is an explicit grant of discretion the court applies a deferential standard of review. Bhatia, 834 P.2d at 581 (Bench, P.J., Concurring). As one of the keys to this analysis, Judge Bench has indicated what he thinks the supreme court meant when it spoke of "explicit grants of discretion." In his view, that term means the "legislature must direct or authorize the agency to define the statutory term by rule." Id. If no explicit grant exists then the court determines whether the statute is ambiguous. Ferre, 828 P.2d at 510. If not, the court "applies the statute according to its plain meaning." Id. If the statute is ambiguous the court attempts to apply the traditional rules of statutory construction. Id. If it can do so, and divine the intent of the legislature, it applies a correction of error standard. Id. If traditional statutory construction does not produce a legislative intent the court will then assume the legislature intended for the agency to make a judgment concerning the appropriate policy and find an implicit grant of discretion. Id. at 510-11.

There are two major distinctions between the analysis Judge Bench has recently advocated and that applied in some earlier cases. First, opinions applying the earlier analysis have found explicit legislative grants of discretion in statutory language which is much broader than simply a legislative directive to define a term by rule. Second, rather than applying plain meaning and other statutory construction methods as independent steps in the analysis, the earlier opinions use statutory construction as a tool in deciding whether the statute contains an implicit grant of discretion.

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15. (...continued)  
grant the agency discretion. Therefore, counsel should not read Luckau, Bhatia, and Mor-Flo as requiring this court to assess ambiguity prior to assessing whether a grant of discretion exists.

16. Opinion by Judge Bench with Judge Russon concurring and Judge Billings concurring in the result only.

17. See also Chevron U.S.A., Inc. v. Tax Comm'n, 207 Utah Adv. Rep. 23, 24 & n.6 (Utah App. 1993) (Opinion by Bench, J.; Garff, J., concurring; Russon, J., concurring in the result) (finding no explicit grant under Judge Bench's definition); Belnorth Petroleum Corp. v. Tax Comm'n, 204 Utah Adv. Rep. 29, 30 (Utah App. 1993) (Opinion by Bench, J.; Garff and Russon, JJ., concurring) (same).

We turn now to Utah Supreme Court cases to determine whether they have applied the analysis articulated by Judge Bench or the broader one used in the earlier opinions issued by this court. Morton itself provides the answer. In footnote 40, the court gives the following example of an explicit grant of discretion by the legislature.

For example, section 59-12-104(16) provides for "sales or leases of machinery and equipment purchased or leased by a manufacturer for use in new or expanding operations (excluding normal operating replacements . . . as determined by the commission)." (Emphasis added.)

Morton, 814 P.2d at 589 n.40. This illustration does not show a specific legislative directive to define a statutory term by rule as Judge Bench would require. Rather, it is a grant of authority to the commission to interpret or apply statutory language. This language constitutes the explicit grant of discretion that requires a reviewing court to apply an intermediate standard of review to agency action under the statute.

Additionally, Morton twice states the question the court is reviewing is one of "statutory construction or application, and absent a grant of discretion, the Commission's decision will be reviewed" for correctness. Id. at 589 & 592 (emphasis added). Thus, it is not simply interpretation or definition of statutory language we review under section 63-46b-16(4)(h)(i), but application of that language as well. Moreover, Morton discusses agency actions in terms of "dealing with statutory terms" and "dealing with an issue," not "interpreting" or "defining" statutory terms. See id. at 588 & 589. Likewise, nothing in the language of section 63-46b-16(4)(h)(i) supports the limitation Judge Bench proposes. Consequently, Morton refutes a cornerstone of Judge Bench's analysis, that an explicit grant of discretion can only be found in language directing the agency to define a statutory term by rule.

Furthermore, in Union Pacific Railroad Co. v. Tax Commission, 199 Utah Adv. Rep. 13 (Utah 1992), a post Morton opinion, the Utah Supreme Court applies the broader analysis. In that case the railroad challenged some determinations of the Tax Commission. The court, without identifying whether it found an explicit or implicit grant of discretion, held the Commission had discretion to interpret the statutory terms "repairs" and "renovations." Id. at 17. Regardless of whether the supreme court found an explicit grant or an implicit grant, it looked for a grant of discretion prior to construing the statute on its own, as have our earlier opinions.

In addition, the court has frequently found implicit grants of discretion and has not applied statutory construction as a separate step in its analysis. See, e.g., BJ-Titan Serv. v. Tax Comm'n, 183 Utah Adv. Rep. 20, 24 (Utah 1992) (holding Utah Code Ann § 59-15-4(1) (Supp. 1986) (current version at id. § 59-12-103(1)(a) (1992)) contains implicit grant of discretion); Chicago Bridge & Iron Co. v. Tax Comm'n, 196 Utah Adv. Rep. 18, 20 (Utah 1992) (applying reasonableness review to Tax Commission's determination individual is a "real property contractor" because such determination is based in part on law and in part on fact). As with our earlier opinions, the supreme court uses statutory construction as a tool in ascertaining whether an implicit grant of discretion exists. See, e.g., Nucor Corp. v. Tax Comm'n, 832 P.2d 1294 (Utah 1992) (applying reasonableness review to agency's interpretation of statutory language based on implicit grant because language subject to multiple interpretations).

We now articulate the analytical model we have derived from Morton for determining if the more deferential standard of 63-46b-16(4)(h)(i) is to be utilized in reviewing an agency action. This model applies in all UAPA cases dealing with either the interpretation or application of agency-specific law by an agency. First, we determine whether the legislature explicitly granted deference to the agency to interpret or apply statutory language at issue. As Judge Bench has rightly noted, we can find an explicit grant of deference in specific statutory language directing the agency to define a statutory term by regulation. Additionally, a statute directing the agency to interpret or apply specific statutory language should be interpreted as an explicit grant of discretion. If we find such a grant, we review under section 63-46b-16(4)(h)(i) for abuse of discretion. That is, we afford the agency some deference and assess whether its action is within the bounds of reasonableness.

Second, if we do not find an explicit grant of discretion, we examine the language of the statute and the statutory framework for an implicit grant of discretion." If the statutory language is broad and expansive or subject to numerous interpretations we will assume the legislature has chosen to defer to the policy making expertise of the agency and we will find an implicit grant of discretion and review the action under section 63-46b-16(4)(h)(i) for abuse of discretion. If, on the

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18. We note, as the court did in Morton, the ways we articulate of finding a legislative grant of discretion are not exhaustive. In the appropriate circumstances we could find a grant of discretion via an analysis yet unarticulated. See Morton, 814 P.2d at 589 (noting other methods of finding deference might arise).



other hand, the language is unambiguous and we can interpret and apply the statutory language by the traditional methods of statutory construction, utilizing our own expertise to divine the legislative intent, we review the agency action under section 63-46b-16(4)(d) for correction of error.

Utah Code Ann. § 35-1-45 (1988) is the portion of the Utah Workers' Compensation Act at issue here. Without articulating the analysis we have set out above, we have previously held "section 35-1-45 does not expressly or impliedly grant discretion to the Industrial Commission . . . ." Cross v. Board of Review, 824 P.2d 1202, 1204 (Utah App. 1992). Accord Stokes v. Board of Review, 832 P.2d 56, 58 (Utah App. 1992). This holding is in harmony with the analysis we explain today.

Section 35-1-45 does not contain a directive to interpret or apply a statutory term. Thus, it does not contain an explicit grant of discretion. Further, because the language is not broad and expansive but is narrow and mandatory and is subject to construction by traditional rules of statutory construction, the statute does not contain an implicit grant of discretion. We, therefore, review the Industrial Commission's action under section 35-1-45 under UAPA section 63-46b-16(4)(d) for correctness. Accord Stokes, 832 P.2d at 58; Cross, 824 P.2d at 1204.

#### TEMPORARY TOTAL DISABILITY COMPENSATION

On appeal, King claims he has been denied his statutory right to temporary total disability compensation. The Industrial Commission argues King was appropriately denied benefits because the extended period of his disability was due to his "incarceration and the unavailability of medical care, circumstances over which the defendants had no control." The Industrial Commission concedes that workers' compensation benefits should not be terminated merely as a result of incarceration. Instead, the Commission, in denying benefits, focuses on the extension of the period of King's disability as a result of his incarceration.

##### A. Workers' Compensation Act

Workers' compensation is a statutorily-created benefit. See Utah Code Ann. §§ 35-1-1 to -107 (1988 & Supp. 1992). Section 35-1-45 is the provision of the Utah Workers' Compensation Act relevant in the instant case. It provides:

Each employee . . . who is injured . . . by  
accident arising out of and in the course of

his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines . . . . The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

Id. § 35-1-45 (1988) (emphasis added).

Once awarded, temporary total workers' compensation benefits "are to continue 'until [the claimant's] condition has stabilized.'" Booms v. Rapp Constr. Co., 720 P.2d 1363, 1366 (Utah 1986) (quoting Entwistle v. Wilkins, 626 P.2d 495, 497 (Utah 1981)). Medical stabilization is the time when "the period of healing has ended and the condition of the claimant will not materially improve." Reddish v. Sentinel Consumer Prod., 771 P.2d 1103, 1104 (Utah App. 1989) (quoting Booms, 720 P.2d at 1366). "When a claimant reaches medical stabilization, he is no longer eligible for temporary benefits and his status must be reassessed." Griffith v. Industrial Comm'n, 754 P.2d 981, 983 (Utah App. 1988). Medical stabilization is independent of the ability of the claimant to return to work. Reddish, 771 P.2d at 1104. Thus, "temporary disability benefits are properly discontinued as soon as the point of medical stabilization is reached, regardless of whether the claimant is actually able to return to work." Id.

King's injury did not achieve medical stabilization until corrective surgery was performed. During the period of his incarceration he was not medically stabilized. Therefore, unless an exception is applied, under the Utah workers' compensation scheme, King qualifies for benefits for the period of his incarceration and the period after his release until corrective surgery was performed.

#### **B. Incarceration**

Whether a claimant who is not medically stabilized may be denied temporary total disability compensation while incarcerated is an issue of first impression in Utah. Other jurisdictions are split on the issue of whether one receiving workers' compensation benefits loses those benefits upon incarceration. However, many courts which have considered the issue have concluded disability

benefits should be paid to an incarcerated claimant.<sup>19</sup> A review of the reasoning articulated by some of the courts awarding benefits is helpful in our resolution of this first impression issue.

In re Spera, 713 P.2d 1155 (Wyo. 1986), is a particularly well-reasoned decision. In Spera, the claimant received temporary total disability payments until January 21, 1985, the date the district court learned he had been incarcerated. The court ordered the suspension of further payments while the claimant remained in jail. The district judge reasoned incarceration, rather than the work-related injury, was the legal intervening cause of his lost wages.<sup>20</sup> In reversing the district court's suspension of payments, the Wyoming Supreme Court held a

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19. See, e.g., United Riggers Erectors v. Industrial Comm'n, 640 P.2d 189 (Ariz. App. 1981) (awarding benefits because incarceration was not voluntary removal from job market and there was no legislation taking away these benefits); Bearden v. Industrial Comm'n, 483 P.2d 568 (Ariz. App. 1971) (holding right to workers' compensation not forfeited during incarceration if sentence less than life because no statute so provides and this is an issue which should be determined by the legislature); Crawford v. Midwest Steel Co., 517 So.2d 918 (La. App. 1987) (holding claimant entitled to benefits despite incarceration because statute does not provide otherwise); DeMars v. Roadway Express, Inc., 298 N.W.2d 645, 647 (Mich. App. 1980) (affirming total disability compensation despite felony conviction because denial of benefits under such a situation "is not the province of the Board or the judicial branch"); Forshee & Langley Logging v. Peckham, 788 P.2d 487 (Or. App. 1990) (holding claimant entitled to temporary total disability during incarceration because he was never medically stationary nor released for work during incarceration); Last v. MSI Constr. Co., 409 S.E.2d 334 (S.C. 1991) (awarding incarcerated claimant temporary total disability benefits); In re Spera, 713 P.2d 1155 (Wyo. 1986) (holding under contract principles incarcerated claimant should not be denied temporary total benefits, which under the statute terminate only when the worker recovers and regains his earning power). But see State ex rel. Grennan v. Barry, 594 N.E.2d 51 (Ohio App. 1991) (holding employee not entitled to compensation during period of incarceration); State ex rel. Ashcraft v. Industrial Comm'n, 517 N.E.2d 533 (Ohio 1987) (denying temporary total disability compensation because incarceration was "voluntary" act removing claimant from work force).

20. Similarly, the ALJ denied King benefits on the basis his incarceration was an intervening cause.

worker's incarceration does not require a suspension of temporary total disability payments. Id. at 1158.

Stressing that workers' compensation law is based on "contract" rather than tort principles, the Spera court held the worker's right to benefits arises when he suffers a work-related injury. See id. at 1156-57. The court explained the Wyoming workers' compensation scheme "is based on a concept of industrial insurance," which means "it is based on contract rather than tort principles." Id. at 1156. Under contract principles the worker should not be denied benefits unless a provision in the statutory contract between the worker, the state, and the employer explicitly suspends the benefits. The court explains:

Instead of suing his employer for negligence and having to prove duty, breach, proximate cause, and damages, the worker in our state must file for worker's compensation benefits for which his employer is ultimately liable. Essentially, the system provides disability insurance coverage for the worker. His right to benefits arises when certain conditions precedent occur, primarily, when he suffers a disabling work-related injury. Under contract principles, the worker should not be denied his benefits after the contingency arises, unless a provision in the statutory contract between the worker, on the one hand, and the State and employer, on the other, explicitly suspends the benefits.

. . . Benefits under the statute terminate only when the worker recovers because only then does he regain his earning power. Incarceration has no effect upon benefits which are in the nature of insurance which has become payable as a covered loss.

. . .

. . . .  
. . . The worker's disability payments cannot be characterized as mere governmental largesse that can be eliminated when the worker's needs are fulfilled from another governmental source. Rather, the worker's statutory right to disability payments is akin to a contract right. Nobody would argue, in the private insurance context, that an insurer could withhold payments due under an insurance contract just because the insured had a second policy which covered the same disability. . . .

We believe this same principle should apply to industrial insurance created by statute. Because there is no statutory exception which eliminates benefits when a worker is jailed, the benefits are due the worker even if his needs are fulfilled from another governmental source. The state legislature can change our statute to suspend payments during periods of incarceration, much like a private insurer might place conditions on his coverage. But in the absence of legislation, we decline the State's invitation to make that policy shift ourselves.

Id. at 1157-58 (citation omitted) (emphasis added).

Similarly, in Bearden v. Industrial Commission, 483 P.2d 568 (Ariz. App. 1971), the claimant was awarded temporary disability for a compensable industrial injury and then incarcerated in the Arizona State Prison following a felony conviction. The Arizona Court of Appeals reversed the denial of benefits and held the right to workers' compensation was not forfeited or suspended during a period of incarceration. See id. at 575. In reaching this conclusion, the Bearden court reviewed relevant provisions of Arizona's workers' compensation statutes. Arizona's statutes simply provided that benefits "shall be paid." Id. at 573. The court enumerated provisions of the statutes which suspended or reduced workers' compensation under specified circumstances. As with Utah's statutes, Arizona's statutes contained no provision for the forfeiture or suspension of workers' compensation benefits based on incarceration. The court stated "the Arizona Legislature has not provided for the forfeiture or suspension of compensation and accident benefits during the period of the prison confinement of a claimant serving a sentence less than life." Id. The Bearden court concluded:

No constitutional or statutory provision relating directly to workmen's compensation has been brought to our attention which declares that a person whose civil rights are suspended . . . thereby forfeits his right to compensation . . . . Whether that should be the law is a matter of public policy which should be determined by the Legislature.

Id. at 573-74.

Likewise, in Forshee & Langley Logging v. Peckham, 782 P.2d 487 (Or. App. 1990), the claimant was awarded temporary total

disability compensation prior to incarceration. Like King, the claimant in Forshee was neither medically stabilized nor released for regular work during the period of his incarceration. In affirming the award of benefits, the absence of legislation specifically terminating benefits upon incarceration was significant to the Forshee court. "It is the legislature's province to restrict the ability of incarcerated individuals to collect workers' compensation and, in some situations, it has done so. We decline employer's suggestion that we create additional exceptions that have no basis in the statute." Id. at 488 (citation & footnote omitted).

Thus, the absence of a provision in the state's workers' compensation statutes specifically denying disability benefits to claimants during periods of incarceration is a significant factor in the analysis of many courts when awarding benefits to incarcerated claimants.<sup>21</sup> As with numerous other jurisdictions,

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21. The absence of specific legislation providing for suspension of workers' compensation benefits upon a claimant's incarceration is a significant factor to courts from other jurisdictions awarding benefits to temporarily disabled incarcerated claimants. See Bearden, 483 P.2d at 573-74 (deciding terminating temporary total benefits was matter of public policy which should be determined by legislature); Forshee, 788 P.2d at 488 (reasoning legislature's province to restrict ability of incarcerated individuals to collect worker's compensation); In re Spera, 713 P.2d 1155 (Wyo. 1986) (holding determination of when payments should be suspended is matter that should be left to legislature).

Likewise, the absence of legislation providing for suspension of workers' compensation benefits during incarceration is also important in the analysis of courts which awarded benefits to permanently disabled claimants who were incarcerated. See United Riggers, 640 P.2d at 193 (awarding benefits because incarceration was not voluntary removal from job market and there was no legislation taking away these benefits); Crawford v. Midwest Steel Co., 517 So. 2d 918 (La. App. 1987) (holding claimant entitled to benefits despite incarceration because statute does not provide otherwise). See also DeMars, 298 N.W.2d at 647 (affirming total disability compensation despite felony conviction because denial of benefits under such a situation "is not the province of the Board or the judicial branch"). But see Packard v. Donald Sperry & Sons, 331 N.Y.S.2d 126, 39 A.D.2d 622 (N.Y. App. Div. 1972) (holding claimant not entitled to compensation during incarceration); White v. Industrial Comm'n, No. L-92-040, 1992 WL 348158 (Ohio App. Nov. 27, 1992) (suspending permanent total disability benefits because incarceration amounted to a voluntary abandonment of work).

Utah's Workers' Compensation Act has no provision terminating benefits because of a claimant's incarceration.

Omissions in the Workers' Compensation Act are significant and the "statute should be applied according to its literal wording." Traylor Bros., Inc./Frunin-Colnon v. Overton, 736 P.2d 1048, 1052 (Utah App. 1987). Significantly, as noted in their caselaw, several states have enacted legislation which specifically terminates workers' compensation benefits after a claimant has been incarcerated.<sup>22</sup>

Furthermore, the Utah Legislature has chosen to restrict workers' compensation benefits under certain circumstances. For example, section 35-1-14 provides for a fifteen percent reduction in compensation for an employee's failure to use safety devices, failure to obey employer's safety rule, or employee's intoxication. See Utah Code Ann. § 35-1-14 (1988). Similarly, section 35-1-45 suspends benefits when the accident was "purposely self-inflicted." Id. § 35-1-45. Thus, it is clear the Utah Legislature knows how to limit workers' compensation benefits, and does so when it so desires.

We therefore hold the absence of a statutory provision limiting workers' compensation benefits upon a claimant's incarceration mandates a conclusion that temporary total benefits should be awarded to King. Moreover, the Utah Workers' Compensation Act is based on contract principles and an employee's right to benefits arises when he suffers a work-related injury. Absent an explicit statutory provision, the Industrial Commission is not free to reduce statutorily-created benefits. "The Industrial Commission is not free to 'legislate' in areas apparently overlooked by our lawmakers or to exercise power not expressly or impliedly granted to it by the legislature, even in the name of fairness." Bevans v. Industrial Comm'n, 790 P.2d 573, 578 (Utah App. 1990).

In Utah, workers' compensation is the employee's exclusive remedy against an employer for an industrial injury, a fact which further supports an award of benefits to King. See Utah Code Ann. § 35-1-60 (1988). Under our statutory scheme, King relinquished his right to sue his employer for his industrial injury in exchange for workers' compensation benefits. King's incarceration would not have cost him the right to sue his employer under the common law. Absent legislative action, that

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22. See, e.g., White v. Industrial Comm'n, No. L-92-040, 1992 WL 348158 (Ohio App. Nov. 27, 1992); Wood v. Beatrice Foods Co., 813 P.2d 821 (Colo. App. 1991); Jones v. Department of Corrections, 460 N.W.2d 229 (Mich. App. 1990).

incarceration should not cost him his right to workers' compensation.

The Industrial Commission contends Griffith v. Industrial Commission, 754 P.2d 981 (Utah App. 1988), supports the denial of benefits in this case. In Griffith, we affirmed a denial of benefits where the claimant's disability was prolonged due to a delay in corrective surgery for reasons unrelated to the industrial accident. However, the Industrial Commission's reliance on Griffith is misplaced.

In Griffith, the claimant received temporary total disability benefits for an industrial injury to his ankle. An orthopedic surgeon evaluated his ankle and recommended surgical reconstruction. The Commission concluded the healing period had ended and the claimant's medical condition had stabilized. An internist who evaluated the claimant's hypertension and asthma advised that ankle surgery be postponed until the hypertension and asthma were treated. The Industrial Commission determined the employer was not liable for temporary total disability for the period which the claimant's hypertension and asthma had to be controlled so surgery could be safely performed. The Commission reasoned that surgical repair had to be delayed because of other medical problems, not for further treatment of claimant's ankle. In affirming the Commission's denial of temporary total disability, we found "that the Commission's conclusion that plaintiff's ankle injury had reached medical stability on May 2, 1985 . . . [was] not arbitrary and capricious because . . . [it was] supported by substantial evidence on the record." Id. at 984.

Unlike King, in Griffith the claimant's condition had reached stabilization, a prerequisite for termination of temporary total disability payments. See Booms v. Rapp Constr. Co., 720 P.2d 1363, 1366 (Utah 1986). Accord Greyhound Lines, Inc. v. Wallace, 728 P.2d 1021, 1022 (Utah 1986); Reddish v. Sentinel Consumer Prod., 771 P.2d 1103, 1104 (Utah App. 1989). In Griffith, workers' compensation benefits were properly discontinued. Thus, Griffith provides no support for the Industrial Commission's argument.

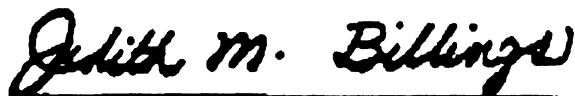
Counsel for the Industrial Commission also suggests we should adopt a rule that as long as circumstances which delay the claimant's surgery are beyond the control of the insurer, the insurer should not be required to pay temporary total disability compensation. Such a rule, however, makes no sense. It would permit the insurer to terminate benefits whenever they deem the claimant's surgery to be sufficiently "delayed," resulting in



subjective and arbitrary determinations." Would the Industrial Commission terminate benefits if King's surgery was delayed only eight days instead of eight months? Indeed, at oral argument counsel for the Industrial Commission indicated that if King's disability had been prolonged for a shorter period the Commission would not have challenged the payment of disability benefits.

#### CONCLUSION

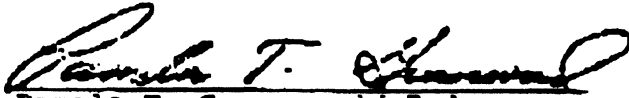
Because Utah's Workers' Compensation statutes do not have specific language limiting benefits for incarcerated recipients of temporary total disability payments, such benefits must be paid until the claimant's medical condition has stabilized. The termination of benefits is a policy matter which must be addressed by the Utah Legislature, not by this court or by the Industrial Commission. Accordingly, we affirm the trial court's ruling and remand this matter for determination of benefits.



Judith M. Billings,  
Presiding Judge

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I CONCUR:



Pamela T. Greenwood, Judge

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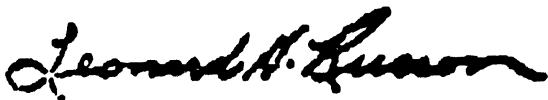
RUSSON, Associate Presiding Judge (concurring in result):

I concur in the result. We have previously set forth the proper standard of review for appeals from the Industrial Commission's denial of compensation under Utah Code Ann. § 35-1-45 (1988) in Cross v. Board of Review, 824 P.2d 1202, 1203-04

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23. For example, under such a rule, an insurer could terminate a claimant's temporary total disability compensation if only one surgeon had the skill to perform corrective surgery but was unable to schedule surgery for three months or was unavailable because he was called to active service as a member of the military reserves.

(Utah App. 1992). At the time of that decision, the proper post-UAPA standard of review for appeals under section 35-1-45 was an issue of first impression in Utah. In Cross, we determined that section 35-1-45 contained no express or implied grant of discretion to the Industrial Commission. Id. at 1204. That decision stands unchallenged as the correct law on the very point raised in this case, and the majority expressly acknowledges this in its opinion. Thus, in light of Cross, and the doctrine of stare decisis as enunciated in State v. Thurman, 203 Utah Adv. Rep. 18, 25 (Utah 1993), I find the majority's protracted examination of the appropriate standard of review in this case unwarranted.



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Leonard H. Russon,  
Associate Presiding Judge

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